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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~857.~~ Eq 2 115

THE COOK COUNTY NATIONAL BANK AND AUGUSTUS H. BURLEY, RECEIVER OF SAID BANK, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 20, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 657.

THE COOK COUNTY NATIONAL BANK AND AUGUSTUS H. BURLEY, RECEIVER OF SAID BANK, APPELLANTS.

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and fourth.

WILLIAM H. BRADLEY, *Clerk.*

THE UNITED STATES OF AMERICA
v.
THE COOK COUNTY NATIONAL BANK OF CHICAGO and AUGUSTUS H. BURLEY, receiver of said bank. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *set:*

Be it remembered that on the 22d day of January, A. D. 1879, came the said complainant, The United States of America, by Mark Bangs, its attorney for the northern district of Illinois, and W. C. Goudy, its special counsel, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in
2 the district aforesaid, its bill of complaint in said entitled cause, which said bill of complaint is in the words and figures following, to wit:

Bill of complaint.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court, northern district of Illinois, December term, A. D. 1878.

UNITED STATES OF AMERICA
v.
THE COOK COUNTY NATIONAL BANK OF CHICAGO and AUGUSTUS H. BURLEY, receiver of said bank.

To the judges of the United States circuit court for the northern district of Illinois, in the seventh circuit:

The United States of America brings this bill against The Cook County National Bank of Chicago, a corporation created and existing under the acts of Congress authorizing the organization of national banks, and its receiver, Augustus H. Burley, a citizen of the northern district of Illinois, and of the State of Illinois, and thereupon your orator complains and says:

That on the 20th day of December, A. D. 1872, John McArthur was appointed a deputy postmaster at the city of Chicago, in the State
3 of Illinois, who immediately thereafter accepted such office and gave bond as required by law and entered upon the discharge of his duties as such deputy postmaster, and at the same time The Cook County National Bank of Chicago was a corporation created and existing under the acts of Congress known as the national bank acts, which was doing business as such national bank in the said city of Chicago, and the same had theretofore been designated as a depository for

moneys or funds of the United States, and the said John McArthur, under the directions of the Postmaster-General, deposited a portion of the postal money and money-order funds in said bank, and drew against the same by cheques as the same was required for the payment of current expenses of the post-office and as was necessary to use money-order funds in the transaction of the business of the office.

And your orator further represents that the said Cook County National Bank of Chicago became insolvent and suspended business on the 19th day of January, 1875, and Augustus H. Burley was, on the 1st day of February, 1875, duly appointed by the Comptroller of Currency the receiver of said bank, who immediately thereafter entered upon the discharge of his duties and is still acting as such receiver, and that
4 at the time of becoming insolvent and of suspension there were on deposit in said bank postal funds to the amount of twenty-four thousand nine hundred dollars and of money-order funds of the United States the sum of fourteen thousand six hundred and eighty four dollars, making in the aggregate the sum of thirty-nine thousand five hundred and eighty-four dollars, which moneys belonged to your orator and had been placed on deposit as aforesaid by the said John McArthur, deputy postmaster at the city of Chicago, and were designated on the books of said bank in its accounts respectively as "postal funds" and "money-order funds" of the United States.

Your orator further says that the Secretary of the Treasury at the time of the said failure and suspension held United States bonds to the amount of one hundred and fifty thousand dollars, par value, as security for all public moneys that should be deposited in said bank, which bonds had been placed in the Treasury Department as such security by said bank, and that afterwards the Secretary of the Treasury sold said bonds and applied the proceeds thereof to the payment of one hundred and fifty-five thousand three hundred and five dollars and forty-seven cents then on deposit in said bank standing to the credit of the
5 United States Treasurer, and that after the payment of the said amount in full there remained of said proceeds the sum of nineteen thousand two hundred and thirty-nine dollars and five cents, which, by direction of the Secretary of the Treasury, was applied by the proper officers of the Post-Office Department to the payment of a debt due from said bank to your orator for the postal funds and money-order funds deposited in said bank by the said John McArthur as such deputy postmaster; that is to say, the sum of eleven thousand eight hundred and three dollars and ninety-eight cents ($11,803.98), on the amount due for postal funds, and seven thousand four hundred and thirty-five dollars and seven cents for the amount due from money-order funds, leaving still due and unpaid by said bank to your orator the sum of thirteen thousand and ninety-six dollars and two cents ($13,096.02) of postal funds, and seven thousand two hundred and forty-eight dollars and ninety-three cents ($7,248.93) of money-order funds, which sums still remain due and unpaid.

And your orator further says that at the time of the said failure and suspension of the said Cook County National Bank of Chicago, there were on deposit in the Treasury Department, bonds of the United States of the par value of one hundred thousand dollars, which
6 had been deposited therein by the said Cook County National Bank of Chicago, under the acts of Congress to secure the national bank notes issued by said bank for circulation.

Your orator further shows that the said Cook County National Bank of Chicago refused to pay the circulating notes, and was in default

therein at the time of its said failure, and for that reason the Comptroller of the Currency, having received notice of said failure, declared the bonds aforesaid, to the amount of one hundred thousand dollars, to be forfeited to the United States.

Your orator further shows that a part of said bonds last mentioned have been sold, and a part are still in the possession of your orator, on deposit in the Treasury Department, and that it is proposed to sell the same and apply the proceeds to the payment of the circulation of said bank, and to reimburse your orator for such sums as may have been paid out in redeeming the same; and that the proceeds of said bonds when all are so sold will be sufficient to redeem all of the national bank notes issued by said bank, and to reimburse your orator for all sums of money used in making redemption of any of said notes, and leave a balance still in the possession of your orator a sum exceeding thirty thou-
7 sand dollars ($30,000.00), and sufficient in amount to pay the debts due by said Cook County National Bank at Chicago to your orator for postal funds and money-order funds deposited in said bank by the said John McArthur, said deputy postmaster at Chicago.

Your orator further shows that there is, in addition to the said bonds to secure the circulation and proceeds thereof, on deposit in the United States Treasury, a sum exceeding thirty thousand dollars ($30,000.00), belonging to the said Cook County National Bank of Chicago, which has been received from the bills receivable and debts due to said bank in the course of settling up its affairs.

Your orator further shows that the said bank was not only insolvent when it suspended on the 19th day of January, 1875, but that it ever since has been and still continues to be insolvent, and that its liabilities greatly exceed its assets, so that only a small percentage can be paid upon the liabilities of said bank.

Your orator further shows that a question has arisen as to whether the said claim of the United States against the said Cook County National Bank of Chicago, for the moneys deposited in it by the said
8 John McArthur, as deputy postmaster as aforesaid, is a preferred debt or not, and that the officers of the United States are in doubt as to their duty in the premises; that is to say, whether it is the right and duty of the officers of the Treasury Department to reserve from the funds in its control belonging to the said bank a sufficient amount to pay the debt for postal funds and money order funds due to your orator as aforesaid, or whether it is their duty to distribute the said moneys pro rata to all the creditors of said bank, including the United States or not.

Wherefore your orator prays that the Cook County National Bank of Chicago and Augustus H. Burley, receiver of said bank, be made defendants to this bill of complaint, and each of them be required to answer the same, but not under oath, that being waived, and that upon the final hearing an account be taken of the amount due to your orator by said bank for the moneys deposited therein by the deputy postmaster at Chicago, and that a decree be entered directing your orator as to the disposition to be made of the funds belonging to said bank in the control of the Treasury Department, and for such other and further relief as to equity shall appear just.

And may it please your honors to grant unto your orator a writ
9 of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Cook County National Bank of Chicago and Augustus H. Burley, receiver of said bank, commanding them on a day certain, therein to be named, and

under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

And your orator will ever pray, &c.

MARK BANGS,
U. S. Attorney.

W. C. GOUDY,
Special Counsel.

(Endorsed:) Filed Jan'y 22, 1879. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 3rd day of March, A. D. 1879, said defendants, by Messrs. Monroe, Bisbee & Ball, their solicitors, filed in said clerk's office their demurrer to the said bill of complaint in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer to bill of complaint.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for said district.

10 UNITED STATES OF AMERICA
v.
COOK COUNTY NATIONAL BANK OF CHICAGO and Augustus H. Burley, receiver, etc. } In chancery.

The demurrer of Cook County National Bank of Chicago and Augustus H. Burley, receiver, etc., defendants to the bill of complaint of the United States of America, the above-named plaintiff.

These defendants, by protestation, not confessing or ackowledging all or any of the matters and things in said plaintiff's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, demur to the said bill, and for cause of demurrer show that the said complainant hath not, in and by its said bill made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from or against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demand the judgment of this honorable court whether they shall be compelled to make any other or further answer to the said bill, and pray to be hence dismissed
11 with their costs and charges, in this behalf most wrongfully sustained.

MONROE, BISBEE AND BALL,
Solicitors for Defendants.

(Endorsed): Filed March 3, 1879. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 9th day of June, A. D. 1879, in the record of the proceedings of said court in said entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, the Hon. Thomas Drummond, circuit judge, and the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
THE COOK COUNTY NATIONAL BANK ET AL. } In chancery.

Now come the parties, by their solicitors, and now comes on to be heard the defendant's demurrer to the bill of complaint herein, and after hearing the same, the court, not being now sufficiently advised in the premises, takes the same under advisement.

Afterwards, to wit, on the 16th day of June, A. D. 1879, in the record of the proceedings of said court in said entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court
12 of the United States, and the Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
v.
THE COOK COUNTY NATIONAL BANK OF CHICAGO and Augustus H. Burley, receiver of said bank. } In chancery.

Now come the parties, by their solicitors, and the court being now fully advised upon the demurrer of the defendants to the complainants' bill of complaint herein, overrules said demurrer and grants leave to said defendants to answer herein, if they shall so elect.

Afterwards, to wit, on the 27th day of September, A. D. 1879, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
v.
THE COOK COUNTY NATIONAL BANK OF CHICAGO, and Augustus H. Burley, receiver of said bank. } In chancery.

This cause coming on for argument upon the demurrer of the defendants to the bill of complaint herein, and the court having heard
13 counsel and being sufficiently advised therein, it is ordered, adjudged, and decreed that the demurrer be overruled, and the defendants having elected to abide by the demurrer, it is further ordered, adjudged, and decreed that this cause be referred to the master in chancery to make and state an account of the amount due from the Cook County National Bank of Chicago, for postal and money order funds deposited by John McArthur, deputy postmaster at Chicago, and thereupon the defendants, in open court, waive the reference to the master, and admit that The Cook County National Bank of Chicago had a sufficient amount to pay the whole of the principal and interest due to the United States for the funds so deposited, as aforesaid, and further that there was due to the United States, on the nineteenth day of January, A. D. 1875, the sum of thirteen thousand and ninety-six dollars and two cents ($13,096.02), for postal funds, and the sum of seven thousand two hundred and forty-eight dollars and ninety-three cents ($7,248.93) for money order funds, and that the same has not since been paid. It is therefore ordered, adjudged, and decreed that there

be paid from the assets of said bank the said sum of thirteen thousand and ninety-six dollars and two cents, and the said sum of seven
14 thousand two hundred and forty-eight dollars and ninety-three cents, full payment of the debt now due to the United States from said bank.

And thereupon the Cook County National Bank prayed an appeal to the Supreme Court of the United States, which is allowed, and the amount of the bond is fixed at five hundred dollars, and Augustus H. Burley approved as a surety.

And on the same day, to wit, the 27th day of September, A. D. 1879, said defendant, the Cook County National Bank of Chicago, filed in said clerk's office its appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Circuit court of the United States for the northern district of Illinois.
In chancery.

THE UNITED STATES OF AMERICA
v.
THE COOK COUNTY NATIONAL BANK OF CHICAGO and Augustus H. Burley, receiver of said bank.

Know all men by these presents that I, Augustus H. Burley, receiver of the Cook County National Bank of Chicago, as principal, and Augustus H. Burley as surety, am held and firmly bound unto the United States of America in the penal sum of five hundred dollars, lawful money of the United States, to be paid to the said The United
15 States of America, to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with my seal, and dated this 27th day of September, A. D. 1879.

The condition of the above obligation is such that whereas, lately, at a term of the circuit court of the United States for the northern district of Illinois, in a certain suit in equity depending therein, wherein the United States of America is complainant and the Cook County National Bank of Chicago, and Augustus H. Burley, receiver of said bank, is defendant, a certain decree was rendered and enrolled by said court on the twenty-seventh day of September, A. D. 1879, from which said decree said Cook County National Bank has prayed for and obtained an appeal to the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such, that if the said Cook County National Bank shall prosecute its said appeal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void; otherwise to remain in full force and virtue.

A. H. BURLEY, [SEAL.]
Receiver of the Cook County Nat. Bank of Chicago.

1 A. H. BURLEY. [SEAL.]

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Sept'r 27, 1879. Wm. H. Bradley, clerk.

17 NORTHERN DISTRICT OF ILLINOIS, *sct.:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein the United States of America is the complainant and the Cook National Bank of Chicago et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 30th day of September, A. D. 1879, and of our Independence the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 657. The Cook County National Bank & Augustus H. Burley, receiver of said bank, appellant, vs. The United States. N. Illinois C. C. U. S. Filed 20th October, 1879.

17-445

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1880.

THE COOK COUNTY NATIONAL BANK AND AUGUSTUS H. BURLEY, RECEIVER, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, *Appellee.*

ADDITIONAL POINTS AND ARGUMENT.

HENRY S. MONROE,

Solicitor and of Counsel for Appellants.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1880.

THE COOK COUNTY NATIONAL BANK AND AUGUSTUS H. BURLEY, RECEIVER, *Appellants*,

vs.

THE UNITED STATES OF AMERICA, *Appellee.*

ADDITIONAL POINTS AND ARGUMENT.

I.

Section number 3,466, R. S., being in derogation of the law governing the distribution of the assets of the debtor among his creditors, and opposed to the equitable rules which ought in such cases to apply, *will be strictly construed, and will* not be enforced against the citizen except in cases which come within its letter. The last clause of this section limits the extent and meaning of the first clause, and *points out the specific cases to which the preference claimed shall apply, and does not* include the case at bar.

Beaston v. *Farmers' Bank of Delaware*, 12 Peters, 102.

United States v. *Fischer*, 21 Cranch, 358–390.
Prince v. *Bartlett*, 8 Cranch, 431.
Theluson v. *Smith*, 2 Wheaton, 396.
United States v. *State Bank of North Carolina*, 6 Peters, 29.

II.

The word "insolvency" in this section has a strict technical meaning, and is applied to those cases and those only in which the title to the property of the bankrupt has passed to and become vested in an assignee or receiver.

Prince v. *Bartlett*, 8 Cranch, 431.
Beaston v. *The Farmers' Bank*, 12 Peters, 102.
Theluson v. *Smith*, 2 Wheat., 396.

III.

The receiver of a national banking association is appointed by the comptroller of the currency, not always or of necessity because of its insolvency. The title to the assets of the association does not vest in the receiver. With regard to the disposal of such assets he can act only under the direction of the court. Hence the case at bar is not within section 3,466.

Sec. 5,234, Revised Statutes.
Venango Nat'l Bank v. *Taylor*, 56 Penn., 14.
Bank of Bethel v. *Pahquioque Bank*, 14 Wal., 383.

HENRY S. MONROE,
Solr and of Counsel for Appellants.

ARGUMENT.

If the government is entitled to priority in this cause it is by virtue of Sec. 3466 revised statutes. This section reads:

"Whenever any person indebted to the United States "is insolvent, or whenever the estate of any deceased "debtor, in the hands of the executors or administrators, "is insufficient to pay all the debts due from the deceased, "the debts due to the United States shall be first satisfied; "and the priority hereby established shall extend as well "to cases in which a debtor, not having sufficient prop- "erty to pay all his debts, makes a voluntary assignment "thereof, or in which the estate and effects of an abscond- "ing, concealed or absent debtor are attached by process "of law, as to cases in which an act of bankruptcy is com- "mitted."

By the very terms of the act this priority does not exist except (1), where an insolvent debtor has made a voluntary assignment of his property; (2) where the debtor has absconded, concealed or absented himself, and his estate and effects have been attached; and (3) in bankruptcy cases.

In no other case or class of cases does the right of priority attach. The statute is in derogation of the law governing the distribution of the effects of a debtor among his creditors, and therefore those instances not within the terms of the act are free from this priority.

This section was carefully considered by this court in *Beaston* v. *The Farmers Bank of Delaware*, 12 Peters, 102.

The court on page 133 says:

"From the language employed in this section and the "construction given it from time to time by this court, "these rules are clearly established: first, that no *lien* is "created by the statute; secondly, the priority established "can never attach while the debtor continues the owner "and in the possession of the property, although he may "be unable to pay all his debts; thirdly, no evidence can "be received of the insolvency of the debtor until he has "been divested of his property in one of the modes stated "in the section; and fourthly, whenever he is thus divested "of his property, the person who becomes invested with "the title is thereby made a trustee for the United States, "and is bound to pay their debt first out of the proceeds "of the debtor's property. *The United States* v. *Fisher*, "2 Cranch, 358; *The United States* v. *Hooe et al.*, 3 "Cranch, 73; *Prince* v. *Bartlett*, 8 Cranch, 431; *Conard* "*The Atlantic Insurance Company*, 1 Peters, 439; *Conard* "v. *Nicholl*, 4 Pet., 308: *Brent* v. *Bank of Washington*, "10 Peters, 596."

(Page 134.) "Congress intended to give priority of "payment to the United States over all other creditors *in* "*the cases stated therein.* It therefore lies upon those "who claim exemption from the operation of the statute "to show that they are not within its provisions."

(Page 135.) "The record in this case abundantly "proves that a bank may become largely indebted to the "United States, and not have property sufficient to pay "all its debts. If to these facts were superadded the "fact of a voluntary assignment by the bank of all its "property in any mode authorized by law, the right of "the United States to priority would be clearly estab-"lished."

(Page 136.) "We are next to inquire into the legal "effect of the appointment of receivers by the Circuit "Court. Without deciding whether a Circuit Court of "the United States has authority in a case like this, to "appoint receivers, with power to take possession of all "the property of a debtor of the United States, it is sufficient to say in this case, that it does not appear that "the power conferred on the receivers was ever executed; "and if it had been, *it would not have been a transfer* "and possession of the property of the Elston Bank "*within the meaning of the act of Congress*, and, therefore, the priority could not have attached to the funds in "their hands. * * * No one can be divested of his property by any mode of conveyance, "statutory or otherwise, unless at the same time, and by "the same conveyance, the grantee becomes invested with "the title."

"The moment the transfer of property takes place "under the statute the person taking it, whether by voluntary assignment or by operation of law, becomes "bound to the United States for the faithful performance "of the trust."

No lien is created by this section. No *bona fide* transfer of property is overreached. If before the preference arises, the debtor has conveyed the property *bona fide*, the vendee takes it free from the lien of the act.

U. S. v. *Fisher*, 2 Cranch., 358–390.
Thelusson v. *Smith*, 2 Wheat., 396.

This court in *Prince* v. *Bartlett*, 8 Cranch., 431, says:

"It is admitted that the property seized by the attachments and executions before stated, was insufficient "to satisfy the several claims exhibited, and that Well-

"man & Ropes were unable to pay their debts, but it "does not appear that their property was attached, as "the effects of absconding or concealed debtors; nor does "it appear, or is it even alleged, that they, or either of "them, have made a voluntary assignment of their "property for the benefit of their creditors; nor is it "alleged that either of them has committed an act of le- "gal bankruptcy. It appears to be the true construction "of the act to confine it to cases of insolvency specified by "the legislature. Insolvency must be understood to mean "a legal and known insolvency, manifested by some no- "torious act of the debtor pursuant to law; not a vague "allegation, which, in adjusting conflicting claims of the "United States and individuals, against debtors, it would "be difficult to ascertain."

The rule here contended for is not only sound in principle, but has been strictly enforced by this court. It held in *U. S.* v. *Howland*, 4 Wheaton, 108, where a debtor of the United States had made an assignment for the benefit of his creditors, that the preference in favor of the U. S. did not arise unless it was proved that the debtor had made an *assignment of* ALL *of his property*, and that where the deed conveyed only the property contained in the schedule, and the schedule did not purport to contain all the debtor's property, the *onus probandi* was on the U. S. to show that it did include all such property.

This priority given by the statute is a mere right of prior payment out of the general funds of the debtor in the hands of the assignee; and hence, where one partner was indebted to the United States, the firm being insolvent, this court has held that the United States had no right to priority of payment out of this fund, (*United States* v. *Hack*, 8 Peters, 271–275,) and that this sec-

tion does not affect any lien, general or specific, existing when the event took place which gave the United States a claim of priority.

Brent v. *Bank of Washington*, 10 Peters, 596–611.

The claim of the United States does not rest upon any sovereign prerogative, but is exclusively founded upon the provisions of the statute.

U. S. v. *State Bank of N. C.*, 6 Peters, 29.

This statute being not only in derogation of the law governing the distribution of the assets of the debtor among his creditors, but also opposed to natural justice, and the equitable rules which ought in such cases to apply, ought to be, and will be strictly construed.

The case made by the government does not bring it within the terms of the law as construed by this court, and we invoke no new technicality to defeat it.

II.

The word "insolvency" in this section means a strict legal insolvency, and applies only to cases where the debtor has assigned all his property, or where it has been seized by attachment, or where, by operation of the bankrupt law the title to *all of his property* has passed into the hands of an *assignee*, and does not apply to cases like the one at bar.

Thelusson v. *Smith*, 2 Wheaton, 396.

Conrad v. *The Atlantic Ins. Co.*, 1 Peters, 386.

U. S. v. *Hooe*, 3 Cranch, 73.

This court held in *U. S.* v. *Howland*, *supra*, that even

in case of an assignment for the benefit of creditors, this statute did not apply, unless it appeared that the assignment covered all the property of the debtor.

A mere inability to pay his debts on the part of the debtor, is not insolvency within the meaning of this law, but it must be manifested by one of the modes pointed out by its explanatory or limiting clause.

Prince v. *Bartlett*, 8 Cranch, 431.

It is sufficient for the purposes of this case that it does not fall within either of those modes. There is here no assignment of all the debtor's property; no attachment of the estate of a concealed or absconding debtor, and no case of bankruptcy, within the meaning of the law.

III.

The receiver of a national bank is appointed by the Comptroller of the Currency not always or of necessity because of its insolvency. The title to the assets of the bank does not pass to or vest in the receiver. In the disposal of such assets, he can only act under the direction of the court.

Sec. 5,141 Revised Statutes gives the Comptroller the power to appoint a receiver in case the capital stock falls below the fixed minimum; Sec. 5,151, in case the surplus provided by the act is not kept good; Sec. 5,205, in case of impairment of capital. Any or all of these might happen, and still the bank be solvent.

The receiver is not vested with the title to the assets of the bank. He is in effect the agent of the Comptroller, and as fast as the assets are converted into money, that is by the receiver sent to the Comptroller of the Currency, and by him deposited in the treasury of the United States.

The National Banking Act, Section 5,234 Revised Statutes, provides: * * *

That "such receiver, under the direction of the Comp-"troller, shall take possession of the books, records and "assets of every description of such association, collect all "debts, dues and claims belonging to it, and, upon the order "of a court of record of competent jurisdiction, may sell or "compound all bad or doubtful debts, and on a like order "may sell all the real and personal property of such as-"sociation, on such terms as the court shall direct. * "* * *"

This section is not at all similar to the provisions of the bankrupt act, by which the title to the assets of the debtor become vested in his assignee. Indeed, its language negatives any such intention.

The court in *Venango National Bank* v. *Taylor*, 56 Pa. Reports, 14, say: "It may be conceded that there is "nothing in the act of congress which declares that the "assets of a bank vest in the receiver immediately from "and after an act of insolvency, as that the appointment "relates back to such act. Indeed at no time does the "property in those assets vest in the receiver."

This court in *Bank of Bethel* v. *Pahquioque Bank*, 14 Wallace, 383, in considering the provisions of this section of the banking act, says pages 397–398:

"Receivers may also be appointed for other causes "than those already mentioned; as, for example, in case "the money reserve which the association is required to "have on hand shall fall below the prescribed amount, "and when notified to make it good the association shall "fail for thirty days to comply with the requirement, or "shall fail for thirty days to increase the capital stock of

"the association to the minimum amount required, where "the same has been reduced below that amount by the "delinquency of the shareholders and consequent sale and "reduction of the stock; or, in case any such association "which is required to keep undiminished the twenty per "centum surplus mentioned in the twelfth section of the "act, shall fail to keep it good, in which event the pro- "vision is that the Comptroller of the Currency may com- "pel said banking association to close its business and "wind up its affairs, as provided in the act under which it "was organized. Whenever a receiver is appointed the "comptroller is required to give notice of the fact, re- "questing all persons having claims against the associa- "tion to present the same and to make legal proof thereof. "Provision is first to be made by the comptroller for re- "funding to the United States any such deficiency in re- "deeming the notes of the association as is mentioned in the "act, and having refunded that amount, the comptroller is "required in the next place to make a ratable dividend of "the money paid over to him by the receiver on all such "claims as may have been proved to his satisfaction *or* "*adjudicated in a court of competent jurisdiction.* Claims "proved to the satisfaction of the comptroller are to be "included in the list, and he is also to include in the list "all claims adjudicated in a court of competent jurisdic- "tion, which shows conclusively that claims disallowed by "the comptroller may be prosecuted in a court having "jurisdiction in such cases. (*Kennedy* v. *Gibson*, 8 Wal- "lace, 506.) Where the whole assets are not collected "and distributed in the first dividend, further dividends on "claims proved and adjudicated may be made as the pro- "ceeds of the assets are collected and paid to the treas- "urer, and the remainder, if any, shall be paid to the share- "holders.

"None of these proceedings, however, support the "theory that the association ceased to exist when the re- "ceiver was appointed, nor at any time before the assets "of the association are fully administered, and the balance, "if any, is paid to the owners of the stock or their legal "representatives."

The receiver, appointed by the Comptroller, has therefore no better title, and so far as the right of possession is concerned, has no greater power than a receiver appointed by a court of chancery, and the case of *Beaston* v. *Farmer's Bank*, *supra*, directly holds that if the authority of the receivers therein had been executed, "it would not "have been a transfer, and possession of the property of "the Elkton bank within the meaning of the act of con- "gress, and therefore the priority could not have attached "to the funds in their hands."

In conclusion, I ask the careful attention of this court to the foregoing points and authorities. To me they seem decisive of this case.

The argument may seem technical, but it is founded upon the decisions of this court, which has only followed the dictates of natural justice in strictly construing a statute, which, if the construction asked by the counsel for the government is followed, would in its application to this and all similar cases, not only work the greatest injustice, but would also defeat the plain intent of the banking law, which contemplates an equal division of the assets of the bank among its creditors.

Respectfully submitted by

HENRY S. MONROE,

Solr. and of Counsel for Appellants.

115 17-445

OFFICE SUPREME COURT
FILED
DEC 5 1882
JAMES R. MILES

IN THE

Supreme Court of the United States.

TERM, 1880.

THE COOK COUNTY NATIONAL BANK AND AUGUSTUS H. BURLEY, Receiver of said Bank,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

ARGUMENT FOR APPELLANTS.

HENRY S. MONROE,
Solicitor, and of Counsel for Appellants.

WASHINGTON, D. C.:
Thomas McGill & Co., Legal Printers, 1107 *E street Northwest.*
1882.

IN THE

Supreme Court of the United States.

Term, 1880.

THE COOK COUNTY NATIONAL BANK AND AUGUSTUS H. BURLEY, RECEIVER OF SAID BANK, *Appellants*,

vs.

THE UNITED STATES OF AMERICA, *Appellee.*

HISTORY OF THE CASE.

The Cook County National Bank was organized under the national banking law in

On the 20th day of December, 1872, John McArthur was appointed postmaster in said city, gave bonds, and entered upon the discharge of his duty.

Before that time the Cook County National Bank had by the proper authorities of the government been designated as a depository of its funds.

In this depository McArthur deposited a portion of the postal money and money-order funds, and checked against the same as was required to pay the current expenses of his office, and as was necessary to use money-order funds in the transaction of his business.

This bank failed on the 19th day of January, 1875, and on the 1st of February, 1875, Augustus H. Burley was by the Comptroller of the Currency appointed receiver, and at once entered upon the discharge of his duties as such.

At the time of the failure, McArthur had on deposit with it postal funds and money-order funds belonging to the United States.

In February, 1877, John McArthur failed, and was thereafter, by the proper authorities of the United States, declared a defaulter to the Government of the United States. He was indicted for malfeasance in office, and his bondsmen were sued to recover the amount due the United States.

On the 2d day of January, 1879, the counsel for the bondsmen of McArthur applied to the Hon. Charles Devens, Attorney-General of the United States, for permission to bring suit against the Cook County National Bank and its receiver, to recover the amount claimed then to have been in the Treasury, of the moneys deposited as aforesaid by McArthur.

This permission was granted upon condition that the expense of the suit should be borne by the bondsmen.

If this suit is successful, the amount recovered will apply upon the indebtedness of McArthur to the government, and will relieve his bondsmen so much.

The real controversy in this case is, therefore, between the bondsmen of McArthur and the creditors of the Cook County National Bank, and the question to be determined by this high tribunal is whether those who voluntarily became the sureties of McArthur shall take this money from the creditors of the bank.

Acting under the permission given to the counsel for the bondsmen of McArthur, he filed a bill in the Circuit

Court of the United States for the Northern District of Illinois, in the name of the United States, against the Cook County National Bank and its receiver.

The bill alleges:

First. That the postmaster at Chicago, McArthur, received his commission on December 20th, 1872, and gave bonds.

Second. That the Cook County National Bank had before then been designated as a depository for moneys of the United States.

Third. That McArthur, under the directions of the Postmaster-General, deposited a part of the postal money and money-order funds in said bank, and drew upon the same by check as the same were required for expenses of the post-office, or for transmission of money-order funds.

Fourth. That the Cook County National Bank failed January 19th, 1875, and the defendant, A. H. Burley, was appointed receiver.

Fifth. That at the time there was on deposit $24,900 of postal funds and $14,684 of money-order funds, a total of $39,584, which had been placed in said bank on deposit by McArthur, P. M.

Sixth. That the Secretary of the Treasury, at the time of the failure of the bank, held United States bonds to the amount of $150,000 as security for all public moneys deposited in said bank.

Seventh. That the Secretary of the Treasury afterwards sold these bonds and applied $155,305.47 to the payment of that amount standing to the credit of the United States Treasurer. The rest of the proceeds of such sale, viz., $19,239.05, by direction of the Treasurer, being applied by

the officers of the Post-office Department to the payment of a debt due from the bank to the United States for postal funds and money-order funds deposited in the bank by McArthur, $11,803.98 of postal funds and $7,435.07 of money-order funds, leaving still due the United States $13,096.02 of money-order funds, which still remains unpaid.

Eighth. That at the time of the failure of the bank, there was on deposit in the Treasury Department of U. S. bonds $100,000 to secure circulation, which were by the Comptroller of the Currency declared forfeited to the United States.

Ninth. That on the sale of said bonds and the payment of circulation, there will remain a sum exceeding $30,000, sufficient to pay the debts due from the bank to United States for postal funds and money-order funds deposited by McArthur.

Tenth. That there is, in addition to these bonds, on deposit in the United States Treasury, over $30,000 belonging to the Cook County Bank, which has been received from bills receivable and debts due the bank.

Eleventh. That the bank was, on January 19th, 1875, insolvent, and has since remained so. That a receiver has been appointed, etc.

To this bill a general demurrer was interposed. The court below overruled the demurrer, and entered a decree for the payment of the money to the United States.

To reverse this decree, this writ is prosecuted.

Assignment of Errors.

The court below erred in overruling the demurrer filed in the court below by the appellants to the bill filed therein by the appellee.

POINTS.

First. The enactment of the national banking laws in 1864 repealed section 5 of the law of 1797, making debts due to the United States preferred in all cases of insolvency, and placed the United States upon an equality with the other creditors of insolvent national banks.

Sec. 5 of Act of March 3d, 1797—R. S., sec. 3,466.
Sec. 3,466 of R. S., Banking Law.
" 5,230 " " " "
" 5,234 " " " "
" 5,236 " " " "
Dwarris on Statutes, pp. 154–155.
Davis *v.* Fairborn, 3 Howard, 636.
U. S. *v.* Case of Pencils, 1 Paine, 400.
Dash *v.* VanVleeck, 7 Johns., 497.
Columbian M'fg Co. *v.* Vanderpool, 4 Cow., 556.
Buckley *v.* Furse, 15 John. (N. Y.), 338.
Livingston *v.* Harris, 11 Wend., 329.
Harrington *v.* Trustees, etc., 10 Wend., 550.
Bowen *v.* Lease, 5 Hill, 255.
Williams *v.* Potter, 2 Barb., 316.
Sedgwick on S. L., pp. 124–125.
Attorney-Gen.'s Opinion, vol. , p. .

Second. The enactment of the bankrupt law in 1867 did not repeal or in any way change the rule for the distribution of the assets of insolvent national banks made by the national banking law.

Sec. 5,101 R. S., Bankrupt Law.
In re Manufacturers' National Bank, 5 Bissell, 500.
Buckley *v.* Furse, 15 John. (N. Y.), 338.
Oates *v.* National Bank, 100 U. S., 244.
People *v.* Utica Ins. Co., 15 Johns. (N. Y.), 357–380.

ARGUMENT.

I.

The question presented is whether the claim of the United States for the moneys deposited by McArthur is *a preferred debt or not.* Whether the Treasury Department shall reserve from the funds in its control belonging to the bank an amount sufficient to pay said debt for postal funds and money-order funds, or distribute these funds *pro rata* among the creditors of the bank.

The claim made by the bill is, of course, founded upon section 3,466 of the Revised Statutes, which is a copy of section 5 of the act of March 3d, 1797.

To decide the main question, it will be necessary to determine:

First. Whether or not the provisions of the national banking law in force repealed section 5 of the law of 1797, embodied in the Revised Statutes, in section 3,466. And:

Second. If this is settled in the affirmative, whether or not the enactment of the bankrupt law in force , established a new and different rule in regard to the distribution of the assets of national banks, from that contained in the national banking law.

Section 3,466 of the Revised Statutes reads as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

It is admitted that this act has been held to apply to corporations as well as individuals, and that unless it has been repealed by direct legislation, or by implication, the bill makes a case against us.

These national banks are the creatures of the government. The system was created, organized, and set in motion by the government itself.

Its purpose was by national enactment to authorize and call into existence a system of banking which should in the best possible manner secure bill-holders, and protect the rights of all parties dealing with the corporations that might be organized thereunder.

This national banking law went into effect at a time when the different systems, existing only by virtue of State legislation, had fallen into decay and were, in fact, at an end.

Congress saw the necessity, imperative and pressing, to the commercial and industrial interests of the country, that some system of banking should take the place of the old State banks.

Congress knew that a system to be prosperous and successful must command the confidence of the business men of the nation.

The present national banking law was the result of the deliberations of Congress on this subject.

Before the enactment of the banking law, the United States was a preferred creditor in all cases of insolvency, but it will not be disputed but that Congress had the power to put every creditor of an insolvent national bank, including the government, upon an entire equality.

That in justice and morals it should do so, there can be no doubt.

What would be said of individuals who should create an organization, prescribe the laws, rules and regulations by which it should be governed, and define and limit its powers, and hold it out to the business world as worthy of credit, and then provide that in case of insolvency all debts due to them should be preferred and paid in full?

Such a provision would be regarded as opposed to sound morals and to every principle of justice and fair dealing.

I doubt whether any single member of Congress would have voted to insert a provision in this banking law making the government a preferred creditor in cases of insolvency.

The law of 1797 makes the United States a preferred creditor in all cases of insolvency. *The provisions of the banking law are entirely different.*

The national banking law requires a deposit of United States bonds in the Treasury of the United States more than sufficient to redeem the circulation of every national bank, reserves the right for that purpose to sell them, and pays the circulating notes on presentation, and is, therefore, the guarantor of the circulation.

Section 5230, R. S., one of the sections of the banking law, provides that, on failure of the bank, the Comptroller of the Currency shall sell the bonds deposited to secure circulation, in order to reimburse the United States in the amount expended in the redemption of the notes, and contains this clause:

"For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same."

This section provides that upon the assets of the bank in the hands of the Treasurer, the United States should have a paramount lien, so far as it may be necessary to reimburse the United States for the amount expended in paying the circulating notes.

The language of this section would seem plainly to indicate that it was not the intention of Congress to give the United States a preferred claim for any other debt that might be due to the United States from a national bank.

Section 5234 provides for the appointment of a receiver, and provides that "such receiver, under the direction of "the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

Section 5235 provides for advertisement, calling upon all persons who have claims against the insolvent bank to present the same and make legal proof.

Section 5236 is as follows:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets

of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

It will be seen that section 5234 provides for converting, by the receiver, the property of the corporation into money, and the payment of the same to the Comptroller, for the purpose of distribution among the creditors of the corporation.

That section 5235 provides for the notice to the creditors and their proof of claims against the corporation.

And that section 5236, after providing for the refunding to the United States of any deficiency required in redeeming the notes, provides that the Comptroller shall make a *ratable dividend of the money paid over to him on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction*, and that he shall make further dividends on all claims proved or adjudicated; and that the remainder of the proceeds, if any, shall be paid to the shareholders or their legal representatives.

It is evident that Congress in this banking law only intended to make the amount necessary to redeem the circulating notes of the bank a lien upon the bonds deposited to secure those notes; and *that in all other respects it was the intention of Congress that the creditors of the bank should stand upon an equality.*

Section 5236, which provides how the money that comes into the hands of a receiver, and which belongs to the corporation, shall be divided, declares distinctly that it shall be divided ratably on *all claims that may have been proved or adjudicated in a court of competent jurisdiction, and contains no*

provisions whatever for the payment of any claim to the United States in full.

This, in connection with the clause in section 5230, which provides that the United States shall, for the money paid out to redeem the circulating notes, have a lien upon the assets of the bank, *shows that it was the intention of Congress that the preference* in favor of the United States should *only extend* to *that* and nothing more.

It is impossible that the provisions of section 5236 can be carried out in this case, if the government is to be considered a preferred creditor of the *Cook County National Bank.*

Hence, we see that sections 5230 and 5236 of the banking law repeal by implication section 3466 of the Revised Statutes.

Dwarris, in his work on Statutes, p. 154, says:

"Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory and contrary to the former act 'in the very matter;' and the repugnancy such that the two acts cannot be reconciled; for then *leges posteriores, priores contrarias abrogant.*"

"'If (Id., p. 155) two inconsistent acts be passed at different times, the last,' said the Master of the Rolls, 'is to be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and *its operation is not to be impeded by the mere fact* that it is inconsistent with some previous enactment.'"

The banking law provides distinctly that the receiver shall pay out the assets of the insolvent bank ratably to all

its creditors, and it is impossible that he can so do, and at the same time pay in full the United States, unless the assets equal the debts; and insolvency implies that this is impossible.

The learned editor of Dwarris on Statutes, Mr. Potter, on p. 155, says:

"There are cases where, though the latter statute be not repugnant to a former one, and no express provision in the latter repealing the former, if the latter prescribe the *only rules which shall govern*, it repeals the former one in all those respects in which it differs from the latter as to the governing rule."

See also

Davies *v.* Fairborne, 3 How., 636.

This we think a sound rule, and applying it to the case at bar, the banking law prescribes the rule that shall govern the Comptroller and receiver in dividing the assets of the insolvent corporation. This rule distinctly states that the division shall be ratably among all the creditors who have proved their claims, and it therefore repeals the former act in this respect, "because it differs from the latter as to the governing rule."

In U. S. *v.* Case of Pencils, 1 Paine, 400, the facts were these: By law of 1799 the collector was authorized, after entry made of any goods, on suspicion of fraud, to open and examine, in the presence of two or more respectable merchants, any package or packages, and if found to differ in the contents from the entry, then the goods, wares, or merchandise contained in such package or packages should be forfeited. *Provided, that the said forfeiture should not be incurred*, if it should be made to appear to the satisfaction of the collector, or of the court in which a prosecution for the forfeiture should be had, that such difference proceeded

from accident or mistake, and not from an intention to defraud the revenue.

By act of 1818 the collectors were required "to cause at least one package out of every invoice and one package at least out of every fifty packages of every invoice of goods, wares, or merchandise imported into their respective districts to be opened and examined; and if the same be found not to correspond with the invoice thereof, or to be falsely charged in such invoice, a full inspection of all such goods, wares, or merchandise as may be included in the same entry shall be made; *and if any package is found to contain any article not described in the invoice, the whole package shall be forfeited.*"

The court *held* that the proviso in the act of 1799 was by implication repealed by the act of 1818, although the latter purported to be supplemental to the former, and in deciding the case uses the following language:

"But I think this proviso cannot be considered in force, but is repealed by implication by the act of 1818. It is true, this latter act purports to be supplementary to the act of 1799. And it is admitted that a repeal by implication of a former by a latter statute is not to be favored. But such effect and operation is indispensable in some cases. As when the subsequent statute is inconsistent with the former, and the two cannot be reconciled. So where the latter is on the same subject-matter with the former, and introduces some new qualifications or modifications, the former must necessarily be repealed; the two cannot stand together. And in most cases the question resolves itself into the inquiry, what was the intention of the legislature? Did it mean to repeal or take away the former law, or was the new statute intended as merely cumulative? Affirmatives in statutes that introduce new laws imply a negative of all that is not in the purview. So that a law directing a thing to be done in a certain manner implies that it shall not be done in any other manner."

A subsequent act making a different provision on the same subject is not to be construed as an explanatory act, but an im-

plied repeal of the former, if the latter act is incompatible with the former.

Dash *v.* Van Vleeck, 7 John., 497.
Columbian Mfg. Co. *v.* Vanderpool, 4 Cow., 556.
Livingston *v.* Harris, 11 Wend., 329.

If the latter part of a statute is repugnant to the former part it shall stand, and so far as it is repugnant shall operate as a repeal of the former part. So if there are two statutes on the same subject which are repugnant, the latest operates as a repeal of the first, so far as the repugnancy extends, but no farther.

The latest expression of the legislative will must prevail.
Harrington *v.* Trustees of Rochester, 10 Wend., 450.
Bowen *v.* Lease, 5 Hill., 225.
Williams *v.* Potter, 2 Barb., 316.

SEDGWICK, in his work on Statutory and Constitutional Law, page 124, says:

"It is well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms; and even if the subsequent statute be not repugnant, in all its provisions, to a prior one, yet if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act."

On page 125 he says:

"If two inconsistent acts be passed at different times, the last is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way. * * * *It has been repeatedly declared that every statute is, by implication, a repeal of all prior statutes, so far as it is repugnant and contrary thereto, and that, without any repealing clause.*"

In the case at bar, it is entirely clear that the clause in the banking law was "intended to prescribe the only rule

that should govern in the case provided for," because Congress, at the time of its enactment, had distinctly in view the way in which the assets of an insolvent banking corporation should be distributed; and when it declared that the assets should be divided *ratably among all its creditors, it, by the strongest implication, declared that, so far as these banking corporations are concerned*, the United States should not be a preferred creditor except as to the amount paid by the United States in redeeming the circulation of the bank.

The point under consideration has received the attention and construction of the departments in Washington, and two Attorneys-General have given their opinion thereon.

In 1871, the question under consideration was submitted to Attorney-General AKERMAN, who delivered the following opinion:

"Under the act of March 3d, 1797, section 5, (1 U. S. Stat., 515,) the government has a priority out of the effects of an insolvent debtor, and this has been held applicable to insolvent corporations, indebted to the government. I should think that this priority would exist as to all debts due to the government from an insolvent national bank, but for certain provisions in the national currency act.

"The forty-seventh section of the national currency act, of June 3d, 1864, (13 U. S. Stat., 114,) contains this provision:

"'And for any deficiency in the proceeds of the bonds pledged by such association, when disposed of as hereafter specified, to reimburse to the United States the amount so expended in paying the circulating notes of such association, the United States shall have a first and paramount lien upon all the assets of such association, and such deficiency shall be made good out of such assets, in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.'

"If Congress had intended that the priority established in section 5 of the act of 1797 should be applicable to the case of insolvent national banks, this provision would have

been superfluous. But this careful provision for priority in a certain case, shows that Congress did not design that the priority should exist as to debts not thus specially secured.

"The fiftieth section of the same act (page 115) requires that the Comptroller, 'after full provision shall have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjusted in a court of competent jurisdiction.'

"No preference is here given to the United States as a creditor except for a particular kind of debt, and the direction to divide ratably must be held to put the United States, except as to the privileged class of debts, on the same footing with all other creditors."

This decision was adopted and acted upon by the Treasury Department, and was afterwards concurred in by Attorney-General WILLIAMS.

The law of 1789 makes the debts due the government preferred in all cases.

The law under consideration creates these banks, provides for securing the circulation, gives the government a first and valid lien upon the bonds in its hands belonging to the bank, to the *extent only* that is necessary to pay the circulation. It then provides for the winding up of banks in cases of insolvency; provides that the Comptroller shall appoint a receiver who shall collect the debts due the bank, convert its assets into money, enforce stockholders' liability; provides for proving claims against the bank, and then declares that the money so collected and received by the receiver shall be paid into the Treasury of the United States, and be subject to the order of the Comptroller, and that the Comptroller shall then divide the *same ratably and equally among the creditors of the bank.*

It cannot be said that it was the intention of Congress when this banking law was passed that debts due the government should be first paid, and the surplus ratably divided among the other creditors of the bank.

The language of the act is susceptible of no such meaning.

This provision cannot be carried out in substance or in spirit, if the government is to be considered a preferred creditor.

Suppose A., a principal, writes B., his agent, to settle his debts, to pay C. *in full and divide the balance* ratably amongst the rest of his creditors; and that afterwards A. writes B. in detail, telling what the debts are, how to ascertain their precise amount, how to convert the assets into money, and then directs B., when he has the money in his hands, to divide the same ratably among all his creditors. Which letter is to govern in case the assets are not sufficient to pay all? What is B. to do? Which letter is he to obey? Can he obey them both? Are they consistent? and if not, which is to govern?

In the first he is told C. is to be paid in full. The assets are not sufficient to pay all. By the second letter he is directed to pay all ratably. Is it not impossible that both can stand?

If not, is there in law any doubt as to which shall govern?

In such a case is there any doubt but that B. would be liable in case he should pay C. in full?

In determining the meaning of statutes, do not the same rules of interpretation apply that apply to contracts?

Here stands the government. Its uniform and invariable rule is to exact a preference in case of the insolvency of its debtors. That is its law and its legal right.

Long after the enactment which is the foundation of this rule, it by law provides for the formation of these banking associations. It with great care and detail provides laws for their management, the creation of their officers, and various punishments for their violation of duty; provides for their insolvency by directions so careful and minute that they constitute a perfect system of bankruptcy; provides for the appointment of a receiver; directs how he shall proceed to collect the moneys and convert the assets of the bank; directs him to pay the money so collected into the Treasury of the United States, subject to the order of the Comptroller; and then directs the Comptroller to divide this money ratably among *all* the creditors of the bank.

The constitutionality of the national banking law has been settled by this court in Veazie Bank *v.* Fenno, 8 Wall., 584.

Under this law and in pursuance of its provisions the various national banks of the country have been organized and have mainly furnished to the country its circulating medium. By this law the government intended to create banks which should take the place of those which passed away at the commencement of the war, that should be not only safe as mediums of exchange, but also sound as depositories of the funds of the business world. Under this law a system has been inaugurated which has given us a currency second to none, good not only in every part of our own country, but also in all the commercial centers of the civilized world.

This law provides that in cases of insolvency the assets of these banks shall be converted into money and deposited with the Treasurer of the United States.

When this money is thus deposited, the United States becomes its trustee, bound in equity, in honor, and in law

to distribute it according to the rights of those interested therein.

It is not to be presumed that this great government intends in the enactment of its laws to commit an act of injustice that no honorable man would be guilty of. It is not to be presumed that it would create an agency, hold the agent out to the business world as worthy of credit, and, when that agent becomes insolvent, take charge of its assets, convert them into money, and then say to the creditors of the agent: "Out of this money I must first be paid in full."

It is rather to be presumed that the government, in the enactment of its laws, intends that their operation shall work no injustice; that it shall at least accord with fairness and honesty.

When, in the enactment of this law, it said, in case any bank organized hereunder shall be unable to pay its debts in full, the money, the avails of its assets, after the payment of its circulation and the taxes due the government and the State, shall go to the Comptroller of the Currency, and he "*shall make a ratable dividend of the money paid over to him by such receiver, on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction,*" it could not have intended that the United States should stand as a creditor first preferred.

It did intend, after the payment of the circulating notes and the taxes, national and State, to place all creditors, including the government, upon an entire equality.

It seems entirely plain that this law, by necessary implication, repeals the law of 1797, and that the construction hitherto put upon it by the government, the Secretary of the Treasury, the Comptroller of the Currency, and sustained by the opinions of the Attorneys-General of the government, is the true one, and that the construction now

sought to be established is not only inequitable and unjust, but unsound.

II.

Did the enactment of the bankrupt law repeal the provisions of the banking law above referred to?

The banking law was in force on and after June 3, 1864.

The bankrupt law went into operation March 2, 1867.

The bankrupt law, therefore, is the latest expression of the legislature; and the question here presented is whether its enactment repealed the provisions of the national banking law.

Section 5101 of the Revised Statutes, one of the provisions of the bankrupt law, is as follows:

"In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full, in the following order:

"*First.* The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this title, and for the custody of property as herein provided.

"*Second.* All debts due the United States, and all taxes and assessments made under the laws thereof.

"*Third.* All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

"*Fourth.* Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months preceding the first publication of the notice of proceedings in bankruptcy.

"*Fifth.* All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority, in like manner as if the provisions of this title had not been adopted. But nothing contained in this title shall interfere with the assessment and collection of taxes by the authority of the United States or any State."

This section provides: First, for the payment of fees and expenses; second, for the payment of all debts due the United States, and all taxes and assessments under the laws thereof; third, for the payment of all debts due the State, and all taxes and assessments levied under State laws; fourth, for the payment, to a certain amount, of wages due to clerks, operatives, and servants; fifth, for the payment of those who, by the laws of the United States, might have been entitled to a priority if the bankrupt law had not been enacted.

No reference to the banking law is made in the bankrupt law. In it there is no indication of any intention on the part of Congress to interfere with the rights and privileges of banks given by the banking law.

There is not the same reason why this preference should not be inserted in the bankrupt law, that there is why it should not be inserted in the banking law. In the one case the government is in no way connected with the insolvency.

In the other it is the creature of the government that has erred. It is the agent of the government that has become insolvent.

The government is, and to a certain extent ought to be, held accountable for the management of these national banks; and it would be a monstrous wrong for it to claim preference over the other creditors in cases of insolvency.

The national banking law contains full and minute provisions, in cases of insolvency, for the taking possession of, the appointment of receivers for, and the winding up of national banks.

First. For not keeping a good surplus.

Second. For not keeping stock at minimum.

Third. For not keeping a good reserve.

Fourth. For not selecting a place for the redemption of its notes.

Fifth. For holding its own stock over six months.

Sixth. For non-payment of its circulating notes.

Seventh. For improperly certifying checks.

Eighth. For failure to pay up the capital stock, or allowing the same to become impaired by losses.

Ninth. The law provides that any violations of the provisions of the act on the part of the bank or its officers, shall, upon the judgment of a Federal court, work a forfeiture of its franchise.

The provisions of the bankrupt law are different. That law provides for no receivers, but for assignees. The duties and powers of the assignee in bankruptcy differ widely from the duties and powers of the receiver of a national bank. The one is appointed by the court; the other is appointed by the Comptroller of the Currency. In the one case the court has the control of the funds of the bankrupt, and the assignee converts the assets into money and pays it out upon the order of the court. In the other, the receiver, under the direction of the Comptroller, converts the assets into money and pays it to the Comptroller, who divides it, or superintends its division, among the creditors.

The assignee is an officer of the court, and makes his report to the court. The receiver is an officer of the Comptroller, and makes his report to him.

This banking law has been in force sixteen years, and it never yet has occurred to any one that the bankrupt law repealed any of the provisions of the banking law above referred to, although the thirty-seventh section of the bankrupt law declared that the provisions of that law should "apply to all moneyed, business, or commercial corpora-

tions and joint stock companies," and the forty-eighth section that the word "person" should include "corporation."

These two laws have each been regarded by the courts as in full force, and numerous banks have been closed and their assets administered by the Comptroller and receivers appointed by him, with the aid and assistance of the Federal courts.

In December, 1873, the question arose in the Northern District of Illinois, and was submitted to Hon. HENRY W. BLODGETT, as to whether or not a national bank could, under the provisions of the bankrupt law, be forced into bankruptcy. There was no question but that it had been guilty of acts of bankruptcy. The question was simply whether the bankrupt law was applicable to national banks, and was one of first impression. To it that learned judge applied his extraordinary powers, and the correctness of his decision, I believe, has not been questioned.

I here quote the language bearing directly upon the question under consideration, because it is more conclusive than anything I can say:

(Reported in 5 Bissell, p. 500.)

"The bankrupt law is the latest expression of the legislative will, and its general terms and provisions must be held to repeal all previous statutes necessarily incompatible with it. The question then is, does the bankrupt law repeal and supersede the provisions in the currency act for winding up the affairs of insolvent national banks? or can its provisions be applied to those corporations, and leave intact the provisions of the currency act on the same subject? There is no doubt of the soundness of the general rule of interpretation cited by the counsel for the respondent: that a statute, although so general in its terms that its letter would comprehend all classes of persons and things to which it can relate, will nevertheless be construed by the courts as not applying to a particular class which has been specially provided for and regulated by another statute relating solely to such class, if there is no language in the general statute repealing the former statute, or in any manner referring to it.

"A thing which is in the letter of a statute, is not within the statute unless it be within the intention of the makers.

" 'Where the intention of the legislature is not apparent to that purpose, the general words of another and later statute shall not repeal the particular provisions of a former one.'

"The rule is thus stated in Sedgwick on the Construction of Statutory and Constitutional Law, p. 97, 2d ed.:

" 'In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. * * * The reason and the philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the later act such a construction, in order that its words shall have any meaning at all.' * * *

* * * "It will thus be seen that while the currency act does not specify in detail and provide for all the specific acts of bankruptcy enumerated in the bankrupt law, it yet does furnish, through the functions of an important public officer—the Comptroller of the Currency—a very complete and detailed scheme or plan for administering the affairs of an insolvent national bank. It is true, there is no provision for an individual creditor's putting this machinery in motion. But the presumption is that Congress deemed it wiser to leave this duty to an impartial public officer rather than intrust it to the hasty, inconsiderate, and perhaps selfish action of one or more creditors. It was probably thought that the necessity of maintaining the public confidence in the system was such as would compel the Comptroller to act in all cases when a bank has become derelict or discredited, and that this consideration, together with the clear obligations of duty thrown upon the officer, would be sufficient to insure his action in all cases when he acquired the right to do so. At all events, the law as it was enacted

contained ample and specific provisions for creating and managing these corporations, and for administering their affairs when they became unable or refused to perform their public functions.

"The system has been in operation nearly ten years. Over two thousand banks have been organized under it. Of these, twenty-one have been wound up through the agency of the Comptroller and a receiver, the great part of them since the enactment of the bankrupt law. All the legislation of Congress has looked toward the perfecting and perpetuation of the system; and ought we now to say that Congress, by the enactment of the general bankrupt law, intended to place these corporations under the provisions of that law, and to repeal the elaborate plan which it had specially furnished for winding up their affairs when they became insolvent or incapable of transacting banking business?

"That it did not intend to repeal them is conclusively evidenced by the fact that in two of the important amendatory acts, those of March 3, 1869, (15 U. S. Statutes at Large, p. 326,) and March 3, 1873, especial reference is made to those winding-up provisions of the original act, and they are treated as being in full force. So, too, in several cases which have been before the Supreme Court since the enactment of the bankrupt law, reference has been made to these winding-up powers as still in force. * * * I have already cited the evidence which shows to my mind that Congress did not intend to repeal the winding-up provisions of the currency act by the passage of the bankrupt law, and a comparison of the provisions of the two acts shows with equal clearness to my mind that it did not intend to inject the provisions of the bankrupt act into the currency act, so that creditors could apply the remedies of the bankrupt act, and the Comptroller the remedies of the currency act; because such a construction would inevitably produce collisions and conflicts of jurisdiction, and the remedies given by the bankrupt act would be so far unavailing in regard to important assets as to make it evident that there was no intention to apply such a remedy. Suppose this court were to adjudge this respondent bankrupt to-day, and send its messenger and assignee to take possession of the assets, the officer of the court could

in no event enforce the personal liability clause, or obtain possession of the government bonds deposited to secure the circulation, or any surplus of those bonds after fully redeeming the circulation. Those assets are beyond the reach of this court or its officers, and can only be approached by the way of the Comptroller and his receiver. Then why should this court take cognizance of a case that it cannot administer?

"Why not, rather, say that Congress has acted upon the subject-matter of insolvent national banks, and made specific provisions for administering their affairs, and, inasmuch as the general bankrupt law has not expressly repealed these specific provisions, nor necessarily suspended them, the courts will presume it was the intention of Congress to except this class of corporations from the operation of the later statute? Such conclusion seems to me consistent with authority, and is, in fact, the only conclusion that will not lead to inextricable complication and conflict. * * * * But I take it there is no doubt that the legislative power, which creates an artificial person or corporation, can also prescribe what remedies shall be had against it, and that such remedies would be held to be exclusive, and that the provisions of the general bankrupt law would not be held to apply to corporations at all, but for the express terms of the act. Should they, then, be held to apply to a class of corporations which have, as it seems, a bankrupt law of their own, ingrained into their own constitution, and part of their organic law, by the same authority which enacted the bankrupt law? I think not."

This reasoning seems absolutely conclusive.

If the bankrupt law does not repeal the provisions of the banking law, if a "general statute without negative words will not repeal the particular provisions of a former one," intended to apply to particular persons or things, then the clause of the banking law which provides that the assets of the insolvent bank shall be distributed *pro rata* among its creditors, is in no way changed by the general provision of the bankrupt law providing for a preference in favor of the United States.

"A thing which is within the letter of a statute, is not within the statute unless it be within the meaning of the makers."

Buckley *v.* Furse, 15 Johns. (N. Y.), 338.
People *v.* Utica Ins. Co., Id., 357.
Oates *v.* National Bank, 100 U. S., 244.

Can it be that Congress, in enacting the bankrupt law, which makes no reference to the banking law, intended to repeal a part of one of its most important sections, and leave intact the balance of that law? Is it not plain that it was the intention of Congress that both laws should stand?

If in the enactment of the bankrupt law it was the intention of Congress to leave in full force the general provisions of the banking law, and at the same time repeal *the one provision* under consideration, is it possible that no reference would have been made to it?

This is one of the most important provisions of the banking law. It is incomplete without it, and the position of the appellee in this case is an impeachment of the legislative ability of Congress.

As before shown, the best of reasons existed inducing Congress, in the banking law, to provide that the assets of insolvent national banks should be divided equally among all their creditors, whilst there is absolutely no reason why, in the enactment of the bankrupt law, the old rule should be re-established.

In Conclusion.

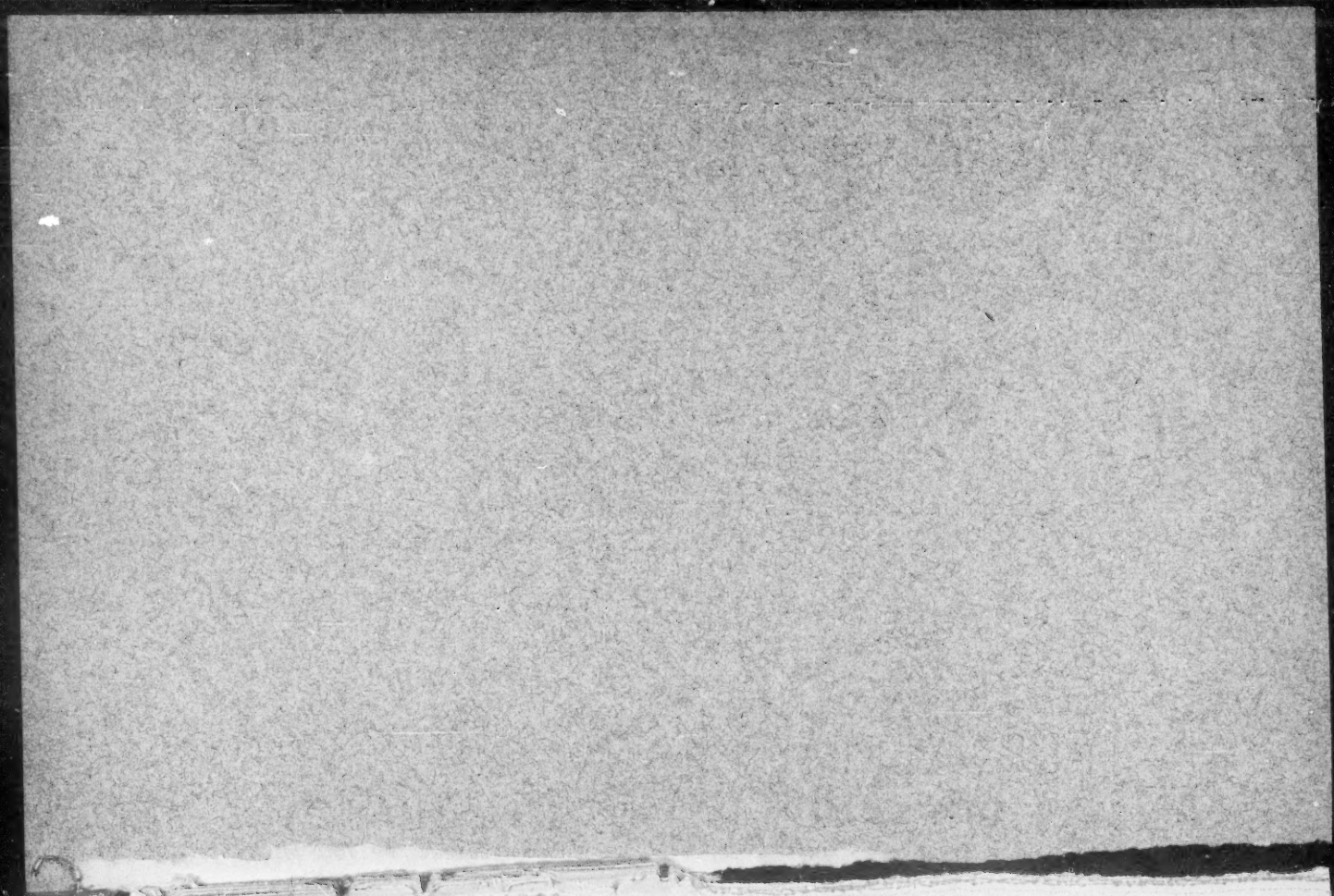
This case is an important one. The legal question involved is not without difficulty. It is for this high tribunal to say whether or not the construction put upon the banking law by the Treasury Department, and sanctioned by the opinions of its Attorneys-General, shall stand as the true interpretation of that law.

The rule heretofore acted upon is sound in law, is just and equitable. It divides the assets of the insolvent bank equally among its creditors. The effect of the rule contended for by appellee is to relieve the bondsmen of a defaulting postmaster, by taking the money claimed from the *bona-fide* creditors of an insolvent bank. It enables the government, after it has held out its agent as worthy of credit, to take from its assets in cases of insolvency sufficient to pay the principal in full, leaving the remainder to be divided among creditors who trusted it because of the confidence reposed in its principal.

Respectfully submitted.

HENRY S. MONROE,

Solicitor and of Counsel for Appellant.



OFFICE SUPREME COURT U. S.
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17-445

IN THE

Supreme Court of the United States,

OCTOBER TERM, A..D. 1880.

COOK COUNTY NATIONAL BANK, and AUGUSTUS H. BURLEY, Receiver of said Bank,

vs.

THE UNITED STATES OF AMERICA.

Appeal from the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEE.

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.

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Appeal from the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEE.

The counsel for appellants makes a preliminary statement, in which he departs from the record, and as is usual in such cases, he is mistaken about the facts. This suit was commenced by the United States, because it was believed that there was a good cause of action, and that it was the most direct course to pursue in order to recover the debt due to the United States.

It is not necessary to make any statement of facts; they will be best ascertained by reading the bill. Appellants filed a demurrer to the bill, thereby admitting the facts, which was overruled, and a decree rendered without further answer.

It is sufficient to say that the United States had a valid claim against the Cook County National Bank for a certain amount of money, which had been deposited as post office funds by the deputy postmaster at Chicago; that the bank had become insolvent, and failed to redeem its circulating notes, and a receiver had been appointed according to the National Bank Act. The bank is unable to pay its debts in full, and the question presented is: Is the United States entitled to a preference in payment of its debt, or are the funds in bank to be distributed ratably among its creditors, including the United States?

It is admitted by counsel for the appellants that the United States is entitled to priority if section 5 of "An act "to provide more effectually for the settlement of accounts "between the United States and receivers of public money, "approved March 3, 1797," continued as §3466 revised statutes, applies to and includes national banking associations. It is claimed that a debt due to the United States is to be paid ratably with all debts due to private persons, because of certain provisions in the National Bank Act which repeal section 5 of the act of 1797 by implication. This proposition is denied. There is no other disputed question in the case.

POINTS.

I.

The bank being insolvent and in debt to the United States the debt is to be first satisfied in full, and the balance only, divided ratably among other creditors.

1 Stat. at Large, 515.
Rev. Stat. Sec. 3466.

II.

A corporation is a person within the meaning of Sec. 3466 revised statutes.

Beaston v. *Farmers' Bank*, 12 Peters 102.

III.

This section is to be construed liberally to protect the United States.

United States v. *Fisher*, 2 Cranch, 385.
United States v. *State Bank of North Carolina*, 6 Peters, 34.
Beaston v. *Farmers' Bank*, 12 Peters, 102.

IV.

Section 3466, Rev. Stat., which was originally passed as Section 5 of "An Act to provide more effectually for the "settlement of accounts between the United States and re- "ceivers of public money, approved March 3, 1797," has not been repealed by any provision of the National Bank Act of 1864.

1. There is no repugnancy between the National Bank Act and the act of 1797.

2. The policy of the government has been to claim priority in the payment of all debts due to it.

U. S. v. *Fisher*, 2 Cranch, 385.
U. S. v. *State Bank*, 6 Peters, 34.
Beaston v. *Farmers' Bank*, 12 Peters, 102.
Savings Bank v. *U. S.*, 19 Wal., 227.
Lewis v. *U. S.*, 92 U. S., 618.

3. Wherever the government is not expressly named in an act of Congress, the law is not to be construed as including or affecting the rights of the United States.

U. S. v. *Knight*, 14 Peters, 315.
U. S. v. *Herron*, 20 Wal., 255.
U. S. v. *Green*, 4 Mason, 427.
U. S. v. *Hoar*, 2 Mason, 311.
U. S. v. *Hewes*, Crabbe, 307.
Com. v. *Baldwin*, 1 Watts, 56.
Phila. v. *Am. Ph. Soc.*, 42 Pa. St., 9.
People v. *Rossiter*, 4 Cowen, 143.
Jones v. *Tatham*, 20 Pa., 398.
Josslyn v. *Stone*, 28 Miss, 753.
Jones v. *U. S.*, 1 Nott. & H., 383.
Baxter v. *State*, 10 Wis., 454.

ARGUMENT.

Section 5 of the act of 1797, continued in the Revised Statutes as section 3,466, reads as follows:

"Whenever any person indebted to the United States "is insolvent, or whenever the estate of any deceased "debtor, in the hands of the executors or administrators, "is insufficient to pay all the debts due from the deceased, "the debts due to the United States shall be first satisfied; "and the priority hereby established shall extend as well "to cases in which a debtor, not having sufficient property "to pay all his debts, makes a voluntary assignment there- "of, or in which the estate and effects of an absconding, "concealed or absent debtor are attached by process of "law, as to cases in which an act of bankruptcy is com- "mitted."

The word person used in the statute includes a corporation.

Beaston v. *Farmers' Bank*, 12 Peters, 134.

The act is not confined to revenue officers and persons accountable for public moneys, but extends to debtors generally, and it is to be construed liberally for the benefit of the United States.

United States v. *Fisher*, 2 Cranch, 385, 395.
United States v. *State Bank*, 6 Peters, 34.
Beaston v. *Farmers' Bank*, 12 Peters, 102.
Savings Bank v. *United States*, 19 Wal., 227.
Lewis v *United States*, 92 U. S., 618.

The right of the crown in England, by the common law, to priority in the payment of debts due to the government, was one of the royal prerogatives. In the United States the same principle has been recognized and es-

tablished by the acts of Congress, the first of which was passed in 1795, and followed by that of 1797. Although the right of such priority cannot, strictly speaking, be called a prerogative of the government, yet, being established by an early act of Congress, effect has been given to it precisely the same as if it was a prerogative right. In *United States* v. *Wilson*, 8 Wheat., 253, it was held that a discharge under an insolvent law of the State of New York did not release him from a debtor liability for a debt due to the United States. The act of Congress of February 20, 1839, abolished imprisonment for debt for any debt on process issuing out of a court of the United States where, by by the laws of said State, imprisonment for debt had been abolished, and it was held that this act did not prevent imprisonment for a debt due to the United States.

U. S. v. *Hewes*, Crabbe, 309.

A discharge under a bankruptcy act which released a bankrupt from all debts, claims, liabilities and demands, was held not to include a debt due to the United States.

U. S. v. *Herron*, 20 Wal., 251.

Lewis v. *U. S.*, 92 U. S., 622.

A debt due to the United States is not barred by the statute of limitations of a State, although the judiciary act of 1789 declares that the laws of the several States shall be regarded as rules of decision in trials at common law, in cases where they apply, and under this statute a private individual would be barred.

U. S. v. *Hoar*, 2 Mason, 312.

This policy has been recognized and enforced whenever the question has arisen. The bankrupt act first passed in 1867, and after the National Bank Act expressly provided that all debts due to the United States should be first paid in full, after the payment of the fees, costs, and expenses of the proceeding.

The right of the United States to a preference has been fully established as the rule by statutes and judicial decisions, and is equal in this form of government to the prerogative right of the Crown in England to have its debts first paid.

U. S. v. *Herron*, 20 Wal., 263.
U. S. v. *Hewes*, Crabbe, 313.

It devolves on the party who asserts, that he comes within an exception to the general rule, to show it clearly.

As the appellants claim that an exception has been created by the legislation in regard to national banking associations, and that Congress has abandoned the fixed and continuous policy, by depriving the United States of a preference for a debt due from such an association, it may be well to refer to another rule of law, before examining the bank act.

In England, where a statute is general, and thereby any prerogative, right, title or interest is divested or taken from the King, in such case the King is not bound, unless the statute is made to extend to him by express words.

Bacon's Abridg. Title "Prerogative," E. 5.
U. S. v. *Knight*, 14 Peters 315.
U. S. v. *Herron*, 20 Wal., 255.

This court has applied the same rule to the United States, and declared it to be "the settled rule of construc-"tion that the sovereign authority of the country is not "bound by the words of a statute unless named therein, if "the statute tends to restrain or diminish the powers, "rights, or interests of the sovereign."

U. S. v. *Herron*, 20 Wal., 255,
U. S. v. *Green*, 4 Mason, 427.
U. S. v. *Hoar*, 2 Mason, 311.
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Baxter v. *State*, 10 Wis., 454.
State v. *Kinne*, 41 N. H., 238.

In the light of these cases and principles, let us look at the provisions of the National Banking Act, which was passed in 1864.

The purpose was to enable persons to associate and organize a corporation to conduct a banking business. As one of the objects was to give credit to the bonds of the Government and secure their sale, it was provided that they should be the basis of circulating notes, and that the Government would take the bonds, in case of a failure of the bank to redeem the notes, and itself redeem them at par. To protect the United States from loss, it was further provided that the United States should have a claim for any advance over the proceeds of the bonds, and that such claim be a *paramount lien* upon all the assets of the bank, and should be paid from "such assets *in preference to any and all other* "*claims whatsoever*, except the necessary costs of adminis- "tering the same." (R. S., § 5,230).

Counsel for the appellants assumes that the sole object of this provision was to give the United States a preference over other creditors of the bank, and argues that it was the intention of Congress to deprive the Government of the preference it had, by the law of 1797, for the payment of any debt due from the bank at the time it became insolvent.

But other objects are apparent.

First. The right to repayment from the assets for

money advanced after insolvency did not exist without some such provision.

Second. By the acts prior to this the United States had no *lien* for any debt.

Third. The payment of the claim for advances to redeem the notes was given a preference over any and all other debts, including those of the United States.

The existence of these objects or any one of them is enough to repel the inference that the sole intention was to establish a preference only as to that particular claim, and diminish the rights of the Government as to preferred debts due when the bank failed. Even if these objects were not apparent, the legislature may have made such a provision *ex majore cautela*, without intending to deprive the United States of its existing right as to debts due before such advances were made.

The main argument of counsel for appellants rests on § 5236, which reads as follows:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the share-holders of such association, or their legal representatives, in proportion to the stock by them respectively held."

What is "a ratable dividend" on all claims proved? It is assumed that it means the comptroller shall place all

claims, other than that of the United States for advances to redeem notes, in one class, and pay on each one the same percentage. If the comptroller should make two or more classes, according to the legal rights or liens of the creditors, and pay on each class the same percentage, but different as to the several classes, would not that be a ratable dividend?

Webster defines the word *ratable:* "1. Capable of being rated, or set at a certain value. 2. Liable or subjected by law to taxation, as ratable estate." The verb *rate* is defined: "1. To set a certain estimate on; to value at a certain price or degree. 2. To settle the relative scale, rank or position of, as, to rate a ship, to rate a seaman. 3. To ratify; *syn.*—to value, appraise, estimate, compute, reckon."

There is nothing in these definitions to sustain the position of counsel for the appellants that a ratable dividend required the comptroller to make one class only of all claims and pay the same percentage on each claim. If he made one class due to the United States, another class of taxes due to the State, another class of claims where a legal lien had been acquired according to law, and another class of all other general and unsecured claims, and, having thus classed them, should proceed to pay the first in full, and the next in full, and if the amount should be insufficient, a certain percentage thereon, etc., he would, within the general meaning of the word as given by Webster, be making an estimate, or settling the relative rank or position, or valuing, estimating, computing or reckoning, quite as much as placing them in one class and paying the percentage on each. The construction contended for by counsel supposes that the word "ratably" includes the idea of proportion, or, as it is sometimes used, *pro rata.* Even if the proper definition of this word does include the idea of proportion, it does not necessarily require that all the claims proved should be placed

in the same class. There is nothing in any definition that can be given to the word that requires *uniformity* as to the dividend to be made.

It is enough for the purposes of this argument to show that the meaning of the words used in the statute is doubtful, for if it be doubtful the court would not infer that it was the intention of Congress to repeal the former statute by implication. The last clause of the section expresses the idea of uniformity and proportion without ambiguity, when it is provided that the surplus shall be paid over to the shareholders of such association or their legal representatives in proportion to the stock held by them respectively. No such language is used in the first branch of the section.

But it is not necessary to rest this case on any hypercritical criticism of the language of the statute. The question is, what was the intention of Congress? Did Congress intend to repeal the statute of 1797, establishing a priority in favor of the United States on all debts against insolvent persons and corporations? Did Congress intend to reverse the policy of the government in regard to debts due to it? Did Congress intend to abandon the general policy prevailing in all governments when it passed the National Bank Act? Before the court can reach any such conclusion it must be satisfied that the law-making branch of the government had had its attention called to the effect of such legislation, and that there was a deliberate intention to reverse the policy of the government and to repeal the former act. It is difficult to see how any such intention could be inferred in the absence of an express provision of repeal.

It could not have been the intention of Congress to disturb any existing rights as to the order of payment, or disturb liens which had attached, because there is no language

used to that effect. If it was the intention to direct the comptroller to *first* pay the costs and expenses of winding up a bank ; *Second*, the claims necessary for making good any deficiency in the proceeds of the bonds in the redemption of notes ; *Third*, any debt due to the United States at the time of the failure, as provided in the act of 1797; *Fourth*, any debt which by any judgment, execution or other lien was entitled to priority; and, lastly, all other unsecured debts which by law had no superior rights to payment, according to the rights of creditors under the law; this statute can be construed so as to effect that purpose. There is no language used to indicate a purpose to destroy such rights, even if the legislature had the power to impair them.

There is no necessary inconsistency or repugnancy between the acts of 1797 and section 5236, so that one repeals the other by implication. They are capable of being so construed that both can stand. The acts on the subject of the payment of debts may be said to be in *pari materia*, and so to be construed together.

It could not have been the intention of Congress to repeal the act of 1797, establishing priority in favor of the United States, and thereby to affect the right of the government, *because the United States is not named expressly in that part of Section 5236 which declares that the Comptroller shall make a ratable dividend on all such claims* as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction. If such had been the intention, under the settled law, it should have said "the comptroller shall make a ratable dividend of money so paid over to him by such receiver on all claims, *including those due to the United States*, as may have been proved," &c. The fact that in the same section it is said, that after full provision has been first made for refunding to the United States, any deficiency in redeeming the notes of such association,

and that then the comptroller shall proceed to make a ratable dividend, does not necessarily show that the United States was not to have priority on any debt that might be due to it by a bank, for money deposited or otherwise.

Maxwell on St. (p. 116), says:

"Where the Crown is not expressly named, the infer-"ence that the statute was intended to include it, must not "be doubtful. When a local act imposes wharfage dues "for the repair and maintenance of a harbor, on certain ar-"ticles, including stones, and without expressly binding the "Crown to make such payments, exempted it from liability "in respect of coals imported for the use of the royal pack-"ets, and from a toll over a bridge, the court refused to in-"fer from these exemptions an intention to charge the "Crown in respect of any other goods."

In support of this principle Maxwell cites:

Weymouth v. *Nugent*, 6 Best & Smith, 22.
Westover v. *Perkins*, 2 Ellis & Ellis, 57.

These cases are directly in point.

Suppose Sec. 5,236 had read: "The comptroller shall "make a ratable dividend of the money paid over to him "by such receiver, except that he shall first make full pro-"vision for refunding to the United States any deficiency "in redeeming the notes of such association." Then this would have been stronger language than is actually used in the statute, and yet by the decisions above referred to, the United States would retain its priority over *all* debts whatsoever, and the exception would be regarded as inserted *ex majore cautela*, and the rule would not prevail that where an exemption is specified in a statute that leads to the inference that none others were intended to exist.

See, also, *Feather* v. *The Queen*, 6 B. & S., 257.

The Bankrupt Act of 1867 named the United States as

a creditor who might prove a debt, and gave such claim a preference in payment, next after the costs, fees and expenses, and further provided that except for such debts as were excepted from the operation of the bankrupt act, the discharge should operate as a full release from "all claims," etc.

A suit was brought against a surety of a public officer, and he pleaded a discharge in bankruptcy. This court decided the defense to be bad, because the act did not in express terms declare that debts due to the United States should be covered by the discharge. The general words, "all claims" etc., it was held did not include those due to the United States. The principle that a right of the government could not be affected by the general provisions of a statute unless expressly named, was applied, and the provision in regard to the United States, giving a preference, it was held, did not show an intention to include the government in that part in regard to a discharge.

United States v. *Herron*, 20 Wal., 256.

So here, the banking act gives the United States a preference, next after the payment of costs of administration, for advances made after insolvency to redeem the circulating notes, and then provides that a ratable dividend shall be made on all claims proved &c., without mentioning the United States. Upon the principle approved in the *Herron* case, it will be inferred that Congress did not intend to include the United States and repeal a prior act which gave a preference for all debts due from an insolvent person or corporation.

In re Henley & Co., Law Rep. 9 Ch. D., 469, was a motion for an order that the official liquidator of Henley & Co., should out of the assets of the company, pay the sum of £56 5s to the Receiver General of the Inland Revenue, to satisfy a property tax, due from the company, the pay-

ment to be in priority of other claims against the company. This was a voluntary winding up under the companies act of 1862 (pp. 129–147). The only clause in the act relating to the distribution of assets on a voluntary winding up is Sub. s. 1, of sec. 133, which reads viz.:

"The property of the company shall be applied in satis-
"faction of its liabilities, *pari passu*, and subject thereto,
"shall, unless it be otherwise provided by the regulations
"of the company, be distributed among the members ac-
"cording to their rights and interests in the company."

The same argument was made against payment of the claim of the government in full as in this case. MALINS V. C. held that the government was not entitled to payment in full, but only to a dividend with other creditors.

He says: "Now here there is no exception of the
"Crown whatever, and it would certainly be remarkable,
"that, if it was intended that the Crown should have this
"priority, there should have been no provision made on the
"subject. This Act was passed after great deliberation
"by the legislature; it embodies all the preceding acts for
"winding up, and if this difficulty with regard to the
"Crown, having priority, was intended to be touched,
"surely it would be impossible to suppose that the law
"officers of the Crown, would not have attended to this
"matter and that they would not have taken care that that
"priority, if it was considered that the Crown should have
"it, would have been reserved. But nothing of the kind
"is found here. On the contrary, the Crown gives its
"consent to the act, which says that all the property of
"the company shall be applied in satisfaction of its liabili-
"ties *pari passu*. This particular liability of the company
"is one in respect of £56 5s, for income tax; their liability
"to the other creditors is just the same kind of liability,
"and it is said that their assets are to be distributed *pari*
"*passu*."

But the decision of the Vice Chancellor was reversed on appeal.

JAMES, L. J., said; "it seems to me clear on every prin- "ciple that the Crown is not bound by the companies' act "of 1862, not being specially mentioned in it."

BRETT, L. J., says; "there are two prerogatives of the "Crown bearing on this question; the first is, that the "Crown is not bound by a statute in which it is not spe- "cially mentioned. Therefore the Crown is not bound by "the companies act. It follows that this being clearly a "debt for which the Crown can distrain, its power of dis- "tress is not taken away by that act and it can proceed to "distrain in this case. It is therefore right that the debt "should be paid in priority to the other creditors. But "suppose we regard it merely as a simple contract debt; "then in the administration of the assets of the company, "the Crown comes into competition with other cred- "itors, and then the other prerogative comes in, viz., that "in competition with subjects—the right of the Crown "must prevail.

COTTON, Lord Justice: "In general the Crown is not "bound by a statute, unless expressly mentioned or re- "ferred to by necessary implication. In this case the "Crown had a clear right of distress on the property of the "company, and the question is whether that right is taken "away by the companies' act, 1862. It is clear to me that "this act does not apply to the Crown. It has been so "held with regard to the bankruptcy acts, and the same "principle applies to the winding up acts. Their object is "only to secure a division of the assets among the credi- "tors. That being so, the Crown having a right of dis- "tress which is not taken away by the statute, says: 'I "do not desire to go in and exercise my right of distress, "if the debt is paid in some other way. Then the court

"may direct the liquidator to pay the Crown in priority to "other creditors, rather than oblige the Crown to enforce "its right by distress.' 'But if the case is looked at as one "in which the Crown submits to come in under the ad- "ministration of assets in the winding up, there is still the "right which the Crown has when in competition with "other creditors, of being paid in priority.'" This case thus holds that the Crown may take advantage of a statute, but is not bound by it.

These cases and the principles asserted in them, seem to establish the proposition that, if it was the intention of Congress to repeal section 5 of the act of 1797, giving a priority in all cases in the payment of debts due the United States from insolvent estates, it could only have been shown by an express declaration that the United States should not be entitled to a preference for debts due from a bankrupt national bank.

The fact that special provision is made for reimbursing the United States for a deficiency made good in the redemption of notes, is no evidence of purpose to deprive the government of an established statutory right as to the payment of debts, due in the ordinary course of business. The advances to redeem notes may be considered a part of the expenses of winding up the insolvent association. They certainly are not debts created in the ordinary way.

Counsel for appellant lay stress on the fact that national banking associations derive existence from the government. They are only corporations created like any corporation by the congress or a State legislature, and are in no sense departments of the government. It is too late to talk about the injustice or immorality of a sovereign government taking care of its own rights at the expense of its own citizens or subjects. That has passed the domain of debate.

In this case the goverment has in its possession the money with which to pay its own debt. It is believed to be the invariable custom of the government to pay itself for debts due from such a fund, before parting with the fund. This is an ordinary exercise of sovereign power. The only remedy against its exercise is by legislative action. It may be idle to speculate upon the probable action of Congress on a bill to provide in express terms that the debt of a national bank should not be paid in full to the United States from funds in the treasury, and that individual creditors should stand on an equality with the United States, but he would be a reckless prophet who would predict its passage.

W. C. Goudy
For Appellee

17-445

SUPREME COURT U.S.
DEC 5 1882
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1882.

THE COOK COUNTY NATIONAL BANK AND AUGUSTUS H. BURLEY, RECEIVER,

vs.

THE UNITED STATES.

Appeal from Northern District of Illinois.

ANSWER TO ADDITIONAL POINTS OF APPELLANT.

The only question argued in the court below and in the opening brief of appellant in this Court was the question of repeal by implication of the preference act of 1797 (section 3466 of the Revised Statutes) by the national banking act.

Attention is just called to an additional brief, in which it is claimed that the insolvent bank is not within the provisions of the preference act.

In Prince *vs.* Bartlett, 8 Cranch, 433, where the property of the debtor had been attached, but not as an *absconding, concealed, and absent debtor*, in the language of the act it was held the priority did not attach. Although a discussion of the meaning of insolvency did not seem to be material, yet as the record showed the debtor was unable to pay his debts the court say: "It appears to be the true construction of the act to confine it to the cases of insolvency specified by the legislature. Insolvency must be understood to mean a legal

and known insolvency manifested by some notorious act of the debtor pursuant to law."

It was subsequently held that the insolvency must be followed by an assignee, who has control of all of the property to be distributed to creditors. It might be voluntary or involuntary.

Conard *vs.* Nicol, 4 Peters, 308.

It is claimed for appellants that there must be an assignee by name as well as in effect, and that the technical legal title must vest in the assignee in order to establish the priority. Reference is made to Beaston *vs.* The Farmers' Bank of Delaware, 12 Peters, 131, to support this proposition. The case does not go to that extent. It is true that it was held the appointment of receivers was not within the act, because it is said: "It is sufficient to say in this case that it does not appear that the power conferred on the receivers was ever exercised, and if it had been it would not have been a transfer and possession of the property of the Elkton Bank within the meaning of the act of Congress."

What the scope and power of the receivers were does not appear in the case, and the latter part of the sentence is plainly dicta. Later in the decision it is said: "The moment the transfer of property takes place, under the statute, the person taking it, whether by voluntary assignment or by operation of law, becomes bound to the United States for the faithful performance of the trust."

When the act of 1797 was passed there was no bankrupt act of Congress. Clearly, the language would embrace any such act thereafter passed. It would in like manner embrace any other act providing for winding up an estate of an insolvent, where the whole property was transferred to an assignee, trustee, or receiver, to be converted into money and the proceeds used to pay all of the debts.

It appears from the bill that the bank committed an act of bankruptcy by refusing to pay its paper, and it could

only be saved from the operation of that act, because Congress had provided another way of settling the affairs of an insolvent bank. The bill shows a suspension of business because of insolvency; that the bank failed to redeem its bills, and for that reason the comptroller appointed a receiver, who, under the law, took possession of all the assets, and is proceeding to wind up the bank and pay creditors.

Although the corporation has not been dissolved, it can never resume business. In effect, it is dead, except for the purposes of the receiver and creditors in winding up. All legal remedies are suspended. The only suit allowed is to fix the amount due. There was in this case a "*legal and known insolvency manifested by some notorious act by the debtor pursuant to law.*" The bank has permanently ceased to do business. It has been deprived of all its assets, and they are held by the United States, to be used by the receiver in paying debts.

The statute giving priority does not, nor does any decision of this Court, require that the legal title to the property shall be technically vested in an assignee. It is enough that the bank should be insolvent, that such insolvency should be ascertained in a way provided by law, and that the property and assets should be transferred from the possession of the bank to that of a person authorized by law to dispose of them and use the proceeds in payment of creditors. The priority then attaches.

But if a narrow construction be adopted, the bill in this case shows that there is a surplus from the bonds deposited to secure the circulation equal to $30,000, while the decree is for $20,334.95. By the provisions of § 5227, these bonds were forfeited to the United States, with authority to sell them. The title to these bonds certainly passed from the bank and became vested in the United States in the most technical sense.

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